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Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 695/2015*, **

Submitted by:	J.S. (represented by counsel, Rajwinder S. Bhambi)
Alleged victim:	The complainant
State party:	Canada
Date of complaint:	10 August 2015 (initial submission)
Date of present decision:	28 November 2017
Subject matter:	Deportation to India
Procedural issues:	Exhaustion of domestic remedies; level of substantiation of claims
Substantive issues:	Non-refoulement; risk of torture upon return to country of origin
Article of the Convention:	3

1.1 The complainant is J.S., an Indian national, born on 15 July 1991. He claims that his deportation to India by Canada would violate his rights under article 3 of the Convention, which came into force in Canada on 24 June 1987. On 13 November 1989, Canada made the declaration under article 22 (1) of the Convention recognizing the competence of the Committee to receive and consider complaints from individuals who claim to be victims of violations of the provisions of the Convention. The complainant is represented by counsel.

1.2 On 11 August 2015, pursuant to rule 114, paragraph 1, of its rules of procedure, the Committee, acting through its Rapporteur on new complaints and interim measures, requested the State party not to expel the complainant while the complaint was being considered by the Committee. On 6 October 2015, the State party informed the Committee that the complainant's removal had been deferred in accordance with the Committee's request.

1.3 Upon the State party's request, on 21 February 2017 the Committee, acting through its Rapporteur on new complaints and interim measures, reviewed its interim measures request, in the light of information received from the State party, and decided to lift its request, pursuant to rule 114, paragraph 3, of its rule of procedure.

* Adopted by the Committee at its sixty-second session (6 November–6 December 2017).

** The following members of the Committee took part in the consideration of the communication: Essadia Belmir, Alessio Bruni, Felice Gaer, Claude Heller-Rouassant, Jens Modvig, Sapana Pradhan-Malla, Ana Racu, Sébastien Touzé and Kening Zhang.

The facts as submitted by the complainant

2.1 The complainant was born in the village Govindpura Satwari, Jammu and Kashmir State, India, near the border with Pakistan, to a Sikh family. He submits that his father owned and operated a trucking business that transported dry loads to different states in India. On an unspecified date, the police found one of his father's trucks — which had been abandoned by an employee (driver) of the father — containing explosives. On 6 June 2009, the complainant's father was apprehended by the police in connection with the abandoned truck. While in detention, his father was tortured and accused of aiding Sikh and Muslim terrorists. He was released on 9 June 2009 after the intervention of local officials and after paying a bribe of 50,000 rupees. He was also told to report to the police if he received any information about the driver. Owing to the acts of torture he had allegedly suffered, the father needed medical treatment in hospital. In August 2009 and October 2009, the father was again detained and tortured by the police, then released after paying a bribe. On 19 October 2009, the father decided to complain about the ill-treatment he had received from the police and arranged to meet with a lawyer. The day of the scheduled meeting, the father disappeared. The complainant's family believes that the police was behind the father's disappearance. According to the complainant, villagers informed him and his family that there had been a police raid and they had seen the father with the police on the outskirts of the village.

2.2 Shortly after the father's disappearance, the police started coming to the complainant's home saying that the father had joined "militants". The complainant and his family were allegedly harassed by the police on a regular basis and questioned about the father's whereabouts. In December 2009, the complainant and his family moved to a remote location in Jammu and Kashmir State to avoid the constant harassment.

2.3 On 24 December 2009, the police raided the complainant's new home in Jammu. The complainant submits that he was arrested and taken to a police station, where he was interrogated and tortured for three days. He alleges that he was slapped, kicked, punched, beaten with sticks and belts and electrocuted, and that the police accused him of knowing where his father was and accused his family of "working with Sikh and Muslim terrorists". He was released on 27 December 2009 after the intervention of local officials and after paying a bribe, on the condition that he report monthly to the police starting on 1 February 2010. The complainant alleges that he was serious injured immediately after his release and taken in an ambulance to a hospital, where he stayed for 2 days. He submits that he suffered internal and external injuries, notably marks and swelling from lashes, and was stressed and depressed.[1]

2.4 Fearing for his life, late in January 2010, the complainant left his home for that of his relatives in the village of Ambgarh, Jalandhar, Punjab State, but they refused to let him stay. Later, the complainant left India by aeroplane from Delhi airport, using his own passport. He arrived in Canada on 1 September 2010, with a visa obtained with the help of a smuggler. The complainant submits that, after his departure from India, the police there continued to harass his family. Notably, in February 2010, he alleges that police officers arrested and tortured his mother. The police maintained that the complainant had joined militants and had collected funds from abroad for militias. His mother was released after paying a bribe and with the help of influential people.

2.5 On 13 June 2011, the complainant lodged an asylum request before the Refugee Protection Division of the Immigration and Refugee Board of Canada.

2.6 In February 2013, the complainant's mother moved to his uncle's house in the village of Maralian, outside Miran Sahib, to escape from the police. In the evening of 1 March 2013, his uncle was arrested by police officers. Despite the family's efforts that evening and the next day, they could not locate the uncle. Later, the family received a telephone call from an unknown person stating that a severely injured person had been

[1] A medical certificate dated 16 September 2014 States that the complainant had been treated on 27 December 2009 by a doctor at an unnamed hospital. The certificate also states that the complainant had come to the hospital with internal and external injuries, notably marks and swelling from lashes, had been stressed and depressed and had been hospitalized for two days before receiving further treatment at home for 10 days, and medication.

found next to a highway and brought to a hospital, but had passed away.[2] The family went to the hospital, but the police did not hand over the body to the family so it could be cremated according to Sikh religion and rites and did not allow an autopsy to be performed. Against that background, the family believed that the uncle had been tortured and killed by the police.

2.7 On 4 December 2014, the Refugee Protection Division rejected the complainant's application for asylum, having found that his accounts had not been credible and that he had an internal flight alternative. It found, inter alia, that it was not credible that the police would have released the father after paying a small bribe if they had suspected him of being involved in terrorist activities including explosives. Likewise, it found implausible that, if the police had been looking for the complainant for suspected militant activities, he would have been able to pass through the security checks at Delhi airport using his own passport. The Division also stated that, during the proceedings, the complainant had given four different versions of what the police had told his father on his father's initial release on 9 June 2009 regarding the truck. Likewise, in his application for asylum, the complainant had stated that, on 24 December 2009, the police had accused him and his family of working for Sikh and Muslim militants, but had maintained that the police had asked him about his father's whereabouts and where the explosives were. Finally, the Division stated that, when interrogated about the medical certificate dated 16 September 2014 and about what exact treatment the doctor had performed, the complainant had repeated what was mentioned in the certificate and had not mentioned that any X-rays had been performed. When he later acknowledged that X-rays had been performed, he could not explain why he had omitted to mention that in his application and why it was not reflected in the medical certificate. Against that background, the Division gave the medical certificate "no probative value".

2.8 The complainant applied to the Federal Court of Canada to submit an appeal against the judicial review of the decision of the Refugee Protection Division, but his request was rejected on 18 March 2015.

2.9 The complainant submits that, on 4 June 2015, plainclothes police officers arrested his mother and accused the complainant of being behind a Sikh protest that had taken place in Jammu that day, and that he and other Sikhs had financed the protest from Canada. He also submits that his mother was detained and tortured for four days, and released after paying a bribe of 100,000 rupees on condition that she make the complainant return to India and surrender to the police.

2.10 On 2 August 2015, the complainant applied to the Canada Boarder Services Agency to have his removal deferred. That application was under consideration at the time the present complaint was submitted to the Committee. The complainant maintains that he had informed relatives and friends in India about his deportation, that someone had passed that information on to the police and that police officers had come to his village and announced that they knew he was about to be deported.

2.11 The complainant alleges that, with the decision of the Federal Court of 18 March 2015, he has exhausted all domestic remedies and there is no other remedy available to him in the State party. Notably, at the time his complaint was submitted to the Committee, he could not apply for a pre-removal risk assessment, since failed asylum seekers cannot by law apply for such an assessment within one year of a refused refugee application.

The complaint

3. The complainant claims that, by deporting him to India, the State party would violate article 3 of the Convention, as he would be at risk of being subjected to torture or other cruel treatment or punishment. The State party authorities arbitrarily dismissed his asylum request without giving due consideration to the documentation submitted in support of his allegations.

[2] The complaint provides a copy of a death certificate that indicates that G.S. died on 3 March 2013 and had been brought dead to the hospital at 3.15 a.m.

State party's observations on admissibility and merits

4.1 On 6 October 2015 and 10 February 2016, the State party submitted its observations on admissibility and merits and requested the Committee to lift its interim measures request of 11 August 2015. The State party maintains that the complaint is inadmissible on grounds of failure to exhaust domestic remedies and is manifestly unfounded.

4.2 The State party maintains that the complainant has failed to exhaust all domestic remedies since, on 5 December 2015, he became eligible to apply for a pre-removal risk assessment and for a residence permit on the basis of humanitarian and compassionate considerations; that both procedures are effective domestic remedies; and that, in the event of a negative decision on either his pre-removal risk assessment or humanitarian and compassionate application, he could apply to the Federal Court for judicial review. With regard to the pre-removal risk assessment, the State party stated the complainant would be notified promptly of his eligibility and would be given the opportunity to submit an application. Should an assessment application be filed, the complainant would benefit from a stay of removal pending a decision on his assessment. The assessment scheme is founded on the principle of non-refoulement, in accordance with which a person should not be removed from Canada to a country where he or she would be at risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment. For persons like the complainant who have already had their claim determined by the Refugee Protection Division, a pre-removal risk assessment application is an evaluation largely based on new facts or evidence that may demonstrate that the person is now at risk of persecution, torture, risk to life or risk of cruel or unusual treatment or punishment. Its purpose is to assess whether there have been any new developments since the final determination by the Division that could affect the risk assessment. For that reason, section 113 (a) of the Immigration and Refugee Protection Act provides that evidence submitted for the purpose of a pre-removal risk assessment must be new evidence that arose after the rejection of the claim for refugee protection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection. If the complainant is determined by an assessment officer to be in need of protection, he would not be removed from Canada and would be eligible to apply for permanent resident status.

4.3 The complainant also became eligible to apply for humanitarian and compassionate considerations. When a humanitarian and compassionate application is made by a foreign national in Canada, such as the complainant, it must be considered by the Minister of Immigration, Refugees and Citizenship or his delegate. The assessment of a humanitarian and compassionate application consists of a broad, discretionary review by the decision-maker to determine whether a person should be granted permanent residency from within Canada for humanitarian and compassionate reasons. The decision-maker considers and weighs all relevant humanitarian and compassionate considerations in a particular case, and may be guided in that assessment by considering whether an applicant would experience unusual and undeserved or disproportionate hardship if he or she had to apply for a permanent resident visa from outside of Canada. A stay is not automatically available on an application for humanitarian and compassionate consideration. However, if compelling humanitarian and compassionate grounds can be demonstrated, a stay of removal may be granted until a final decision is made on the application for permanent residence.

4.4 The State party disagrees with the Committee's jurisprudence in which the humanitarian and compassionate application was considered a remedy that should not be exhausted for the purposes of admissibility of a complaint submitted to the Committee under article 22 of the Convention.[3] In that respect, it maintains that, under section 25 (1) of the Immigration and Refugee Protection Act, once an individual submits a humanitarian and compassionate application, the Minister must examine that individual's circumstances. Humanitarian and compassionate officers, like pre-removal risk assessment officers, are senior immigration officials employed by Immigration, Refugees and Citizenship Canada,

[3] The State party refers to *Kalonzo v. Canada* (CAT/C/48/D/343/2008), para. 8.3; *T.I. v. Canada* (CAT/C/45/D/333/2007), para. 6.3; and *W.G.D. v. Canada* (CAT/C/53/D/520/2012), para. 7.4.

and domestic courts have determined that humanitarian and compassionate officers are as independent and impartial as pre-removal risk assessment officers.[4]

4.5 As to the possibility of judicial review of the humanitarian and compassionate considerations and pre-removal risk assessment decisions, the State party notes inter alia that the function of judicial review is to ensure the legality, the reasonableness and the fairness of the decision-making process and its outcomes. The grounds for review listed in section 18.1 (4) of the Federal Courts Act cover all of the substantive ways in which a decision could potentially be reviewed in any context: whether the decision-maker acted within its jurisdiction; whether the decision-maker complied with procedural fairness principles; whether the decision-maker made a factual error; and whether the decision-maker made a legal error. Thus, in order properly to carry out its responsibilities, the Federal Court would necessarily need to review an applicant's claim of being returned to torture in his or her country of origin.

4. 6 The State party provides a detailed description of the asylum proceedings under the Immigration and Refugee Protection Act and points out that the complainant's asylum request was first examined by the Refugee Protection Division, which is an independent, quasi-judicial, specialized tribunal. At that hearing, he was represented by counsel and had the right to provide documentary evidence and oral testimony and to make submissions. Subsequently, the Federal Court examined his application for leave to seek judicial review on 18 March 2015.

4.7 The complaint is manifestly unfounded. It is essentially based on the same allegations that the complainant had made before the State party's authorities in domestic proceedings, which were found to be without merit by independent and impartial decision-makers. The complainant has not demonstrated that he personally faces a real risk of irreparable harm if returned to India. The Refugee Protection Division denied his refugee claim on the basis that his allegations were not credible and that he had an internal flight alternative. It stated that his accounts had been implausible, and that there had been omissions and contradictions in the evidence given. The complainant had been given the opportunity to explain the inconsistencies in his evidence at the hearing, but the Division had not found his explanations convincing.

4.8 The State party refers to the decision by the Refugee Protection Division and maintains that the complainant's allegations that the Indian police perceive him to be a supporter of terrorism are not credible, in particular because, if he had been a terrorist suspect, he would not have been allowed to travel to Canada from Delhi using a passport in his own name. Likewise, when he was allegedly detained by the police, he was released upon payment of a small bribe and without any charges having been brought. There is no information to suggest that the central authorities in India would have any interest in the complainant. The Division also took note of the fact that the complainant had lived in Jalandhar for several months without incident prior to his departure from India; and that he had made inconsistent claims about his mother's whereabouts. Finally, the Division also considered that, even if his allegations were accepted as true, the complainant had an internal flight alternative.

4.9 Likewise, the complainant has provided no relevant evidence substantiating his father's disappearance. He also stated that, because of the torture inflicted on him while in detention, he had been hospitalized for two days in 2009 and treated at his home for another 10 days. However, the only evidence that he provided in support of that assertion was a medical certificate post-dated from 2014. In addition, his description of his injuries was limited to broad assertions, such as "serious internal injuries" and "serious external injuries", and he was unable to describe his injuries in any detail. The complainant also claims that his family has continued to be harassed by police since his departure from India and that his uncle was killed by the police in March 2013. Nevertheless, those assertions are not supported by relevant documentary evidence. Moreover, despite the public nature of his

[4] The State party refers to *Say v. Canada (Solicitor General)*, 2005 FC 739, decision upheld on appeal; *Say v. Canada (Solicitor General)*, 2005 FCA 422, leave to appeal to the Supreme Court of Canada dismissed on 27 April 2006; *Chea Say and Vouch Lang Song v. Canada (Solicitor General)*, 2006 CanLII 13748 (SCC); and *Nalliah v. Canada (Solicitor General)*, 2004 FC 1649, para. 13.

uncle's death, the complainant has not provided the Committee with evidence of local news coverage.

4.10 The State party notes that the complainant arrived in Canada with a visitor visa and using his own passport and that he resided in the State party for approximately nine months before claiming refugee protection. It also points out that he made inconsistent allegations about his mother's current whereabouts. While he stated in his request for deportation deferral before Canada immigration authorities that the police never released his mother after his arrest in June 2015 and that she was presumed to have been killed, he later stated in his complaint before the Committee that his mother had been released on 8 June 2015, after four days of detention. Moreover, he also submitted an affidavit by his mother dated 24 July 2015, which disproved his assertion that she was missing.

4.11 Even if one accepts the complainant's allegations as true, there is no reasonable basis on which to conclude he faces a real risk of irreparable harm upon return. The alleged ill-treatment did not occur in the recent past but 8 years ago, in 2009. In addition, there is no objective evidence that he would be sought throughout India. Current conditions in India as established by objective country reports make it apparent that the complainant has an internal flight alternative. Reports concerning country conditions in India indicate inter alia a marked improvement in the human rights situation for Sikhs to the extent that it can no longer be said that there is a general risk of ill-treatment on return solely on the basis of one's real or perceived political opinion. Only those high-profile militants actively engaged in or perceived to be engaged in or supporting militant activity are likely to be of interest to central authorities on return to India.[5] Even where a country report indicates that Sikhs who hold or advocate particular political opinions may be subject to harassment, detention, arbitrary arrest or torture, such occurrences are typically confined to Punjab State.[6] Country reports further indicate that the actions of the local police in Punjab are most often not politically or religiously motivated towards a particular group or cause, but rather the police in that region fabricate charges under the guise of suppressing threats, political or otherwise, in order to extract bribes.[7] Sikh minorities living in states outside of Punjab have the freedom to practise their religion and have access to education, employment, health care and housing.[8]

Complainant's comments on the State party's observations

5.1 On 28 December 2015 and 2 September 2016, the complainant provided comments on the State party's observations on admissibility and merits and on its request to lift interim measures. He reiterated that, if returned to India, he would be at real risk of torture and pointed out that he had submitted relevant documentation to the State party's authorities that had confirmed his allegations, such as a medical certificate issued by the doctor who had treated him in hospital on 27 December 2009, confirming his allegations of injuries as result of torture.[9] He alleged that he had marks of torture on his body as shown in pictures and that he and some of his relatives had been subjected to torture by the Indian police.

5.2 In general, there is a high level of impunity of the Indian police concerning extrajudicial executions, torture and other crimes, in particular in the Jammu and Kashmir

[5] The State party refers to the report by the Home Office of the United Kingdom of Great Britain and Northern Ireland, "Operational Guidance Note: India" (May 2013), available from www.refworld.org/docid/51a890674.html; the United States of America Bureau of Citizenship and Immigration, "India: Information on relocation for Sikhs from Punjab to other parts of India" (16 May 2003), available from www.refworld.org/docid/3f520d4b4.html; and United Kingdom Home Office, "Operational Guidance Note: India" (20 February 2007), available from www.refworld.org/category,POLICY,,,IND,46028cc82,0.html.

[6] The State party refers to the report by the Immigration and Refugee Board of Canada, "Situation of Sikhs outside the state of Punjab, including treatment by authorities; ability of Sikhs to relocate within India, including challenges they may encounter (2009-April 2013)" (13 May 2013). Available at: https://www.justice.gov/sites/default/files/eoir/legacy/2014/02/04/IND104369.E.pdf.

[7] Ibid.

[8] Ibid.

[9] See footnote 2 above.

region. Despite the improvements of the situation of Sikhs in India, they are still victims of severe ill-treatment and torture by State agents in various regions.[10] In particular, minorities are targeted on a large scale in the Gujarat, Punjab and Jammu and Kashmir regions. Moreover, the Prime Minister of India and head of the ruling party have been accused of involvement in the systematic killing of thousands of Muslims in Gujarat State in 2002. In 2016, the situation in Jammu and Kashmir deteriorated and, on 15 July of that year, a curfew was imposed in all districts of the Kashmir Valley. The police and paramilitary forces resorted to excessive use of force against protesters, resulting in the deaths of more than 70 persons.

5.3 The complainant argues that the Indian authorities are not able to adequately protect its citizens against police abuses. Furthermore, persons who file a complaint are often arrested, killed or disappeared as reprisals. If returned to India, he is likely to be arrested by the police or security forces and subjected to criminal proceedings. The police might implicate him under false, frivolous or fabricated charges under the Prevention of Terrorism Act, especially articles 121 and 121 (a), which carry a maximum punishment of death or life imprisonment. He also submits that, since June 2005, Indian courts have convicted more than 100 former police officers for killings related to false terrorism-related charges.

5.4 In relation to the question of an internal flight alternative, the complainant alleges that, when the persecutors are State agents, there is no internal flight alternative available. Furthermore, there is a systematic pattern of surveillance and control over new arrivals in other parts of India, particularly for those who speak Punjabi or who are Sikh. It would therefore be extremely difficult, if not impossible, for him to be safe in India.

5.5 The complainant submits that he has exhausted all available domestic remedies. The pre-removal risk assessment and the humanitarian and compassionate applications do not provide an effective relief to a person who is at risk of torture if returned to his or her country of origin. In his case, the Immigration and Refugee Protection Act was not available at the time he submitted his complaint to the Committee. Despite the fact that he had become eligible to apply for a pre-removal risk assessment on 5 December 2015, at the time his comments on the State party's observations were submitted to the Committee, the Canada Boarder Services Agency had not offered him the possibility to apply. He argues that it is for the Agency to decide whether to invite him for a pre-removal risk assessment after the one-year period. Moreover, the mere eligibility to apply for an assessment does not constitute stay of removal unless the Agency initiates or offers an assessment to the complainant. In any case, there is a high rejection rate of pre-removal risk assessment applications, and it is likely that such an assessment would, in his case, be rejected.

5.6 The complainant informs the Committee that, on 8 August 2016, he applied for permanent residence on humanitarian and compassionate grounds under section 25 of the Immigration and Refugee Protection Act. However, he argues that the application for humanitarian and compassionate considerations does not constitute an effective domestic remedy since it does not stay deportation, it lasts only between 48 and 57 months and the success rate is very low. Likewise, applications to defer removal are rarely granted by the Canada Boarder Services Agency. Although an applicant can seek judicial review of a dismissal of a pre-removal risk assessment, a humanitarian and compassionate considerations application or a deferral of removal application, those proceedings are very expensive, ineffective and unlikely to bring relief to the applicant since there is low chance of success.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim submitted in a communication, the Committee must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do so under article 22 (5) (a) of the Convention, that the

[10] The complainant refers to the 2013 and 2014 United States Department of State country reports on human rights practice in India.

same matter has not been and is not being examined under another procedure of international investigation or settlement.

6.2 The Committee takes note of the State party's argument that the complaint should be declared inadmissible under article 22 (5) (b) of the Convention on the grounds that the complainant has failed to exhaust all domestic remedies. It recalls that, in accordance with article 22 (5) (b) of the Convention, it shall not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. That rule does not apply where it has been established that the application of said remedies has been unreasonably prolonged or is unlikely to bring effective relief.[11]

6.3 The Committee notes that, according to the information submitted by the parties, the complainant filed two humanitarian and compassionate applications, on 8 August 2016 and 10 July 2017, and that at least the latter one is still pending. However, in any event, the Committee considers that the humanitarian and compassionate application is not an effective remedy for the purposes of admissibility pursuant to article 22 (5) (b) of the Convention, given its discretionary and non-judicial nature and the fact that it does not stay the removal of a complainant.[12]

6.4 The Committee also notes the State party's observations that, when the applicant has already had his or her claim determined by the Refugee Protection Division, the pre-removal risk assessment — as in the complainant's case — is based largely on any new facts or evidence[13] that may demonstrate that the person is at risk of persecution, torture, risk to life or risk of cruel or unusual treatment or punishment; that the pre-removal risk assessment application stays the removal; and that, in the event of a negative decision of the assessment, the person can apply for judicial review to the Federal Court. The State party further maintains that the complainant's application for a pre-removal risk assessment was dismissed by the assessment officer on 8 June 2017 and that, although the assessment decision may be subject to judicial review by the Federal Court with leave and a judicial stay of removal pending the final decision may also be available, the complainant has failed to apply for leave to seek judicial review.

6.5 In the present case, the Committee observes that, in his pre-removal risk assessment application, the complainant submitted new evidence that had not been considered previously by the Refugee Protection Division and the Federal Court within the asylum proceedings. The assessment officer took that new evidence into account and assessed it, together with information about the human rights situation in India (see para. 6.2 above). Nevertheless, the assessment officer concluded that the complainant had not rendered it probably that he would be at personal risk to life or of cruel and inhuman treatment if returned to India. The Committee further observes that, according to section 18.1 (4) of the Federal Courts Act, a judicial review of a pre-removal risk assessment decision by the Federal Court is not limited to errors of law and mere procedural flaws, and that the Court may look at the substance of a case. The Committee also observes that the complainant has not put forward arguments substantiating his allegation that that judicial review of the assessment decision is not an effective remedy. He merely argues that the procedure is very expensive and ineffective since there is a low chance of success. In that regard, the Committee considers that the mere doubt about the effectiveness of a remedy does not dispense a complainant with the obligation to exhaust it. The Committee therefore concludes that the complainant has failed to advance sufficient elements that would show that the judicial review of the pre-removal risk assessment would be ineffective in his case. Furthermore, the Committee notes that the information provided by the parties does not indicate that the complainant had been represented by a State-appointed lawyer, and recalls its jurisprudence that errors made by a privately retained lawyer cannot normally be attributed to the State party.[14]

[11] See, inter alia, *E.Y. v. Canada* (CAT/C/43/D/307/2006), para. 9.2.

[12] See *J.M. v. Canada* (CAT/C/60/D/699/2015), para. 6.2; *A v. Canada* (CAT/C/57/D/583/2014), para. 6.2; and 520/2012, *W.G.D. v. Canada* (CAT/C/53/D/520/2012), para. 7.4.

[13] See section 113 (a) of the Immigration and Refugee Protection Act.

[14] See *R.S.A.N. v. Canada* (CAT/C/37/D/284/2006), para. 6.4.

6.6 Accordingly, in the particular circumstances of the present case, the Committee considers that the complainant has failed to exhaust all domestic remedies since he did not file an application for judicial review of the pre-removal risk assessment decision of 8 June 2017 before the Federal Court. In light of this finding, the Committee does not deem it necessary to examine the State party's assertion that the complaint is inadmissible as manifestly unfounded.

7. The Committee therefore decides:

(a) That the complaint is inadmissible under article 22 (5) (b) of the Convention;

(b) That this decision shall be communicated to the complainant and to the State party.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Distr.: General
25 January 2018

Original: English

Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 696/2015*, **

Communication submitted by:	R.P. (represented by counsel, Rabinderdei Nandoe)
Alleged victim:	The complainant
State party:	Netherlands
Date of complaint:	27 July 2015 (initial submission)
Date of adoption of decision:	4 December 2017
Subject matter:	Non-refoulement; prevention of torture
Substantive issue:	Deportation to Sri Lanka
Procedural issue:	Non-exhaustion of domestic remedies
Article of the Convention:	3

1.1 The complainant is R.P., a Sri Lankan national of Tamil ethnicity, born on 26 August 1981. He is currently awaiting deportation to Sri Lanka. He claims that his deportation by the Netherlands would violate his rights under article 3 of the Convention. The complainant is represented by counsel, Rabinderdei Nandoe.

1.2 On 13 August 2015, the Committee, acting through its Rapporteur on new complaints and interim measures, requested the State party not to deport the complainant while the communication was being considered.

The facts as presented by the complainant

2.1 The complainant was born in Batticaloa, Sri Lanka, and is of Tamil ethnicity. He owned a computer shop and worked there with his brother. In 1989, his sister was taken by the Sri Lanka Army, raped and executed because of her alleged membership in the Liberation of Tamil Tigers of Eelam (LTTE). Consequently, the family was regarded as being an "LTTE family". In 2002, the complainant's brother was arrested by the Army, but later released. After his brother's release, the family complained about his detention to a human rights organization, but had to withdraw it owing to threats from the Army.

2.2 In May 2008, the complainant was arrested and detained in a nearby army camp by the Special Task Forces. The forces had arrested all the young people in the area on suspicion of LTTE involvement. He was accused of being an LTTE supporter and of

* Adopted by the Committee at its sixty-second session (6 November–6 December 2017).

** The following members of the Committee participated in the examination of the communication: Essadia Belmir, Alessio Bruni, Felice Gaer, Abdelwahab Hani, Claude Heller-Rouassant, Jens Modvig, Sapana Pradhan-Malla, Ana Racu, Sébastien Touzé and Kening Zhang.

financing and providing assistance to the organization. The complainant was interrogated four times, with each one lasting about one and a half hours. During the interrogations, he was kicked with army boots and beaten with the back of rifles. After two days, his father managed to get him out of the camp. The complainant was required to report to the authorities once a week. He was given a letter written in Sinhalese, which he could not read. He had to show this letter every time he reported to the authorities. On an unspecified date, the complainant was released from the reporting duty.

2.3 The complainant was again arrested and detained in an army camp by the Special Task Forces in November 2008. He was interrogated twice, in a threatening way, and released the same day. He was asked to be an informant for the Forces, but he did not respond to the request. He was arrested a third time in August 2009, because the Special Task Forces had apprehended his friend who had alleged that the complainant was involved with LTTE. Later, the complainant found out that his friend had hidden weapons near his house. The complainant was again threatened and intimidated by the Forces and detained for two days. He was told not to leave the area and to be available for further inquiries. After his release, the complainant lived with several relatives. In December 2009, some members of the Karuna Group (the Tamil Peoples Liberation Tigers) came looking for the complainant at his work and his house, but did not find him. They damaged windows and the front gate of his house and injured the complainant's brother in his shop. The brother reported the damage to the police, but as far as the complainant knows, the police did not do anything. On 27 March 2010, the complainant was arrested and detained for seven days by the Karuna Group. The complainant states that he was subjected to serious ill-treatment by officers of the Special Task Forces (with whom the Karuna Group collaborated), who caused him physical and psychological harm. They hit him with a flexible tube on his back and kicked him multiple times in his stomach. The complainant had had problems with his back in the past, but they became worse following this ill-treatment. Because of the injuries suffered, he is now in constant pain, mostly in the lower part of his back and hips and he cannot sit for more than 30 minutes in one position. Moreover, he has several small scars on his back. He was held in the Karuna camp, but he managed to escape after a week in detention. The complainant states that he was arrested by the Karuna Group because they thought that he had helped to hide the above-mentioned friend's weapons.

2.4 The complainant fled Sri Lanka on 8 June 2010 with a Sri Lanka passport, which was arranged by a travel agent. The travel agent had arranged a visa for India and Nigeria. After a few months in India, the complainant was told by the travel agent that he had to come back to Sri Lanka before continuing his journey to Nigeria. He was picked up at Colombo airport by the travel agent and taken to a hotel. Later, he took a flight to Nigeria. Upon his arrival in the Netherlands on 2 October 2010,[1] he reported to the Dutch authorities in order to submit an application for asylum. On 9 October 2010, the complainant applied for asylum. Thereafter, he was transferred to a refugee reception centre. On 15 August 2011, the Immigration and Naturalization Service (IND) rejected his asylum application. It concluded that the complainant's story lacked credibility. In addition, a medical doctor examined him and concluded that he did not have any problems with memory or concentration and that he was capable of producing consistent and coherent statements.

2.5 On 12 September 2011, the complainant appealed the negative decision of IND before a court. On 30 December 2011, the complainant was examined by the Medical Examination Commission of Amnesty International, which concluded that it was plausible that the scars on the complainant's body and his health problems (physical and psychological) could have been caused by ill-treatment as stated by the complainant. The complainant submitted this information to the court in March 2012.[2] On 21 August 2012, the court decided in favour of the complainant and ordered IND to re-examine his asylum case given the Medical Examination Commission's conclusions. It also considered that the decision of IND was not sufficiently reasoned.

2.6 On 19 September 2012, IND appealed the court's decision of 21 August 2012 before the Council of State. On 25 August 2014, IND's appeal arguments were found by the

[1] The complainant does not explain how he ended up in Netherlands after travelling to Nigeria.

[2] The complainant does not specify which court.

Council to be justified. In essence, the Council found that the Medical Examination Commission did not establish that the injuries on the complainant's body were caused as a result of the alleged ill-treatment by the Sri Lankan authorities and that the complainant's story and statements were vague and contradictory.

2.7 On 15 April 2015, the complainant submitted a second asylum application. On 21 April 2015, IND rejected the second asylum application, because the complainant did not provide any new facts or new information. On the same day, the complainant appealed IND's decision before the court. On 18 May 2015, the court rejected the complainant's appeal as unfounded. On 26 May 2015, the complainant sent an appellate complaint by post. It was received on 27 May 2015. On 16 June 2015, the Council of State rejected the complainant's appeal on the grounds that it was not submitted within the prescribed time limit set by the law.

2.8 The complainant claims to have exhausted all available domestic remedies.

The complaint

3.1 The complainant claims that there are substantial grounds for believing that he will be in danger of being subjected to torture if returned to Sri Lanka, on the basis of the following:

(a) He is a young Tamil man from the Eastern part of Sri Lanka;

(b) He left Sri Lanka illegally;

(c) He would be returning from the Netherlands, a centre for LTTE fundraising;

(d) He has lodged an asylum claim abroad;

(e) He has a previous record as a suspected or actual member or supporter of LTTE;

(f) He escaped from detention at the Karuna Group camp;

(g) He has scars on his body caused as a result of ill-treatment;

(h) He was asked to be an informant for the Special Task Forces.

State party's observations on admissibility

4.1 By note verbale of 13 October 2015, the State party challenged the admissibility of the complaint. The State party submits that the complainant lodged a second asylum application on 15 April 2015, which IND denied on 21 April 2015. The complainant lodged an application for judicial review of the IND decision, which The Hague District Court rejected on 18 May 2015. The State party notes that the complainant appealed that judgment before the Council of State; however, the appeal was lodged late. The State party alleges that the Council of State provided the author with the opportunity to substantiate the late submission, but he failed to do so. Thus, the Council of State declared the appeal inadmissible on 16 June 2015, as a result of which the proceedings on the complaint's request for residence status came to an end. Accordingly, pursuant to article 22 (5) (b) of the Convention, the complaint is inadmissible due to failure to exhaust all available domestic remedies.

Complainant's comments on the State party's observations

5.1 In his submission dated 7 January 2016, the complainant disputed the State party's assertion that the appeal was lodged late. The complainant referred to his original complaint, in which he explained that the appeal had been mailed on time, however, the Council of State received it one day late.

5.2 The complainant also asserted that the appeal procedure at the Council of State is not an effective remedy, because it does not allow for waiting for the outcome of the decision. The complainant referred to a decision of the European Court of Human Rights of 11 January 2007, in which the Court decided that the particular case was admissible, even

though the complainant did not appeal to the Council of State because he thought that it was ineffective.[3]

5.3 The complainant notes that, under article 30 (a) of the Dutch Alien Act, the Council of State rejects appeals that do not provide new facts of information. Therefore, the Council of State would only decide on the formal question of whether the complainant's supplementary medical report and further information on conditions in Sri Lanka constitute new evidence, and does not examine the substance of the case.

5.4 Finally, the complainant refers to a copy of an email that his counsel received unintentionally, concerning his first asylum application. In the email, an IND employee advises the Secretary of State not to appeal the 21 August 2012 court decision, because IND had not discussed the credibility of the complainant's statements regarding his two arrests, therefore those arrests should be considered as credible. The employee wrote that he regretted that the court had not addressed the connection between the complainant's scars and his statements about the cause of the scars, as well as possible violation of article 3 of the European Convention on Human Rights, considering the Tamil ethnicity of the complainant.

State party's observations on the merits

6.1 In a submission dated 28 October 2016, the State party provided information on the merits of the case. On 2 October 2010, the complainant entered the Netherlands and reported to the Dutch authorities in order to submit an application for asylum. He was given time to rest and prepare his asylum application. On 8 October 2010, a medical examination was carried out to determine whether the complainant could be interviewed. On 9 October 2010, the complainant submitted his application for a temporary asylum residence permit and, on that same day, the first interview was held. During the second interview on 11 October 2010, the complainant was given the opportunity to elaborate on his asylum application. On 27 January 2011 and on 1 March 2011, a supplementary interview was held about the complainant's reasons for leaving his country of origin. Reports were drawn up of the interviews, which were conducted in Tamil with the help of an interpreter. The complainant was given the opportunity to make substantive changes and/or additions in writing to the reports of the interviews, which he did by submitting corrections and additions on 10 October 2010, 13 December 2010 and 10 April 2011. On 14 May 2011, the complainant was given written notification of the State party's intent to deny his asylum application. He was given the opportunity to respond in writing to the notification of intent, which he did by letter of 27 June 2011. The asylum application was denied by decision of 15 August 2011.

6.2 On 12 September 2011, the complainant lodged an application with The Hague District Court for judicial review of the decision denying asylum. The application for review was heard in open court on 27 June 2012. On 21 August 2012, the court declared the application for review well founded.

6.3 On 19 September 2012, the State Secretary for Security and Justice lodged an appeal against the 21 August 2012 court decision with the Administrative Jurisdiction Division of the Council of State. By judgment of 25 August 2014, the Council of State declared the appeal well founded and overturned the decision of The Hague District Court. With that judgment, the complainant's domestic remedies were exhausted.

6.4 On 15 April 2015, the complainant submitted a new application for a temporary asylum resident permit. He was interviewed on the same day in Tamil through an interpreter. On 17 April 2015, the complainant was notified that the State party intended to deny the asylum application. On 20 April 2015, he provided his written opinion about the notification of intent to deny his asylum application. On 21 April 2015, the complainant's second asylum application was denied.

[3] See European Court of Human Rights, *Salah Sheekh v. the Netherlands* (application No. 1948/04), decision of 11 January 2007, para. 121: "An applicant cannot be regarded as having failed to exhaust domestic remedies if he or she can show, by providing relevant domestic case law or any other suitable evidence, that an available remedy which he or she has not used was bound to fail."

6.5 On 21 April 2015, the complainant applied to The Hague District Court for review of the decision. The application for review was heard in open court on 12 May 2015. On 18 May 2015, the court declared the application for review unfounded.

6.6 On 27 May 2015, the complainant lodged an appeal with the Administrative Jurisdiction Division of the Council of State. By judgment of 16 June 2015, the Council of State declared the appeal inadmissible.

6.7 Since the conclusion of these proceedings the complainant has not submitted an application for a residence permit in the Netherlands.

6.8 The State party notes that due care was exercised throughout the asylum proceedings in respect of the complainant and due account was taken of article 3 of the Convention. The complainant was interviewed several times during the asylum proceedings and questioned on the facts and circumstances of his departure from Sri Lanka and on the reasons why he believed he would be treated contrary to article 3 of the Convention if he returned to Sri Lanka.

6.9 The State party also notes that, although the human rights situation in Sri Lanka gives cause for concern, in view of information from various public sources,[4] the State party considers that there is no reason to conclude that expulsion to Sri Lanka would, in itself, involve a risk of treatment contrary to article 3 of the Convention. There is no reason to assume that every Tamil, whether or not they have had links in the past with LTTE, will be subjected to treatment contrary to article 3 of the Convention upon returning to Sri Lanka. Various decisions[5] by the Committee indicate that it, too, remains seriously concerned about continued and consistent allegations of widespread use of torture and other cruel, inhuman or degrading treatment perpetrated by State actors — both the military and the police — which have continued in many parts of Sri Lanka since the conflict ended in May 2009. However, the Committee has no reason to hold that the general situation is such that a real and foreseeable risk of being subjected to torture in Sri Lanka may be presumed. Even if it were probable that the complainant had been subjected to torture, the question remains whether there is a substantial risk of persecution for the complainant. Alleged torture in the past cannot automatically constitute risk of torture today, it is only one element in determining the present risk of torture for the complainant. Other relevant factors include the lapse of time,[6] the situation in the country of origin[7] and the complainant's personal circumstances.[8] The complainant has an obligation to provide sufficient evidence substantiating that such a risk is present and personal.

6.10 The jurisprudence of the European Court on Human Rights[9] indicates that the above-mentioned risks can be taken into account when assessing asylum applications by Sri Lankan Tamils. The Court has also indicated that, since the conflict in Sri Lanka has ended, the level of adverse interest in failed Tamil asylum seekers returning to the country has decreased.[10] There is a risk of treatment contrary to article 3 of the European Convention on Human Rights only if the alien can demonstrate that the authorities are interested in him or her specifically, for example because the alien committed a criminal offence or was an influential member of LTTE. The Court ruled that although States parties have a duty to

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[4] Netherlands, Ministry of Foreign Affairs, Country report on Sri Lanka (October 2014); United States of America, Department of State, *Country Reports on Human Rights Practices for 2015: Sri Lanka* (13 April 2016); Amnesty International, *Report 2015/16. The State of the World's Human Rights*, (23 February 2016).

[5] See *Sathurusinghe Dewage v. Australia* (CAT/C/51/D/387/2009), and *Sivagnanaratnam v. Denmark* (CAT/C/51/D/429/2010).

[6] See *Y. v. Switzerland* (CAT/C/50/D/431/2010); *S.S.S. v. Canada* (CAT/C/35/D/245/2004); *T.A. v. Sweden* (CAT/C/39/D/303/2006); and *S.S. v. the Netherlands* (CAT/C/30/D/191/2001).

[7] See *X. v. Denmark* (CAT/C/53/D/458/2011); and *Bakatu-Bia v. Sweden* (CAT/C/46/D/379/2009).

[8] See *K.K. v. Switzerland* (CAT/C/31/D/186/2001); and *Uttam Mondal v. Sweden* (CAT/C/46/D/338/2008).

[9] See European Court of Human Rights, *N.A. v. the United Kingdom* (application No. 25904/07), judgment of 17 July 2008; *J.K. v. France* (application No. 7466/10), decision of 7 April 2015; and *T.T. v. France* (application No. 8686/13), decision of 7 April 2015.

[10] Ibid., *T.T. v. France*; *J.K. v. France*; and *N. and others v. the United Kingdom* (application No. 16458/12), decision of 15 April 2014.

investigate the risk of complainants being subjected to treatment contrary to article 3 of the European Convention on Human Rights if deported, it must be in a position to assess the asylum seeker's individual situation, which can be impossible when the statements provided to substantiate the asylum request give reason to question his or her credibility.[11]

6.11 The State party does not consider that the specific reasons the complainant gave for leaving Sri Lanka are credible, namely that he had been arrested by the Sri Lankan authorities and the Karuna Group and was still wanted in connection with his statement that his friend had hidden weapons in the garden of his parents' home.

6.12 The State party emphasizes that the complainant's statements about his first arrest in 2008 and his second arrest in 2009 are credible. On the basis of the file, it has been satisfactorily established that the complainant had difficulty with the chronology of the alleged events in his account in support of his asylum application. Apart from the chronology, his other statements regarding those events were consistent and the State party therefore considers his account of the first two arrests credible. The State party also presumes that he was assaulted or tortured by the Sri Lanka Army during his first arrest. However, this does not mean that the complainant would be at risk of treatment contrary to article 3 of the Convention upon returning to Sri Lanka.

6.13 The State party gives no credence to the account of the third arrest by the Sri Lanka Army in 2009 or the arrest by the Karuna Group in 2010 because the complainant's friend had allegedly hidden weapons in the vicinity of his parents' home, for the following reasons:

(a) During his second interview, the complainant made no mention of the weapons hidden by his friend near his house or their connection to his arrest. He explicitly stated that he did not know what his friend had done and why he had been imprisoned. Only after the interview, the complainant mentioned the hidden weapons and their connection to his arrest;

(b) The complainant's explanation for withholding the information, namely that he was afraid that the report of the interview would be sent to the Sri Lankan authorities, is unconvincing, because he made other accusations against the authorities, for instance the allegations of torture and assault in 2008, and the rape and killing of his sister;

(c) The complainant not only withheld the information, but also made contradictory statements about how and when he found out that his friend had hidden weapons;

(d) There were a number of inconsistencies in key elements of the complainant's account that make it implausible that he is wanted by the authorities for alleged involvement in hiding weapons for LTTE;

(e) Other things, such as his easy escape when he was supposedly held by the Karuna Group, the fact that he was able to leave the country on two occasions with a legally acquired passport and to return once without difficulty, led the State party to conclude that there were significant inconsistencies, implausible statements and lack of clarity on issues that were relevant to assessing a claim. Those statements would be pertinent to the Committee's deliberations as to whether the complainant would be at risk of torture were he to return to Sri Lanka.

6.14 Regarding the medical examination conducted by Amnesty International (in the Medical Research Group report), the State party notes that Amnesty International doctors were unable to determine with certainty whether the scars that the complainant attributed to assault during his fourth arrest were in fact the result of mistreatment by members of the Karuna Group in 2010. Amnesty International concluded that its findings with respect to the two scars "could" be consistent with the event described. The State party also notes that, given the wording in the Amnesty International report to explain the causality of the complainant's injuries, leaves open the possibility that the scars could have been sustained differently from the way the complainant described. Especially considering that the

[11] Ibid., *D.N.W. v. Sweden* (application No. 29946/10) judgment of 6 December 2012.

complainant was examined more than a year after he entered the State party, after such a long period, it is no longer possible to determine how old the scars are.

6.15 Regarding the supplementary medical report (from the Institute for Human Rights and Medical Research), submitted by the complainant with his second application for asylum, the State party considers that the cautiously formulated conclusions of the report do not establish that, in the complainant's case, there is a genuine causal relationship between his medical problems and his inability to give a comprehensive account. The Institute for Human Rights and Medical Research did not examine the complainant in person and it describes medical complaints that were already known from the complainant's file. Nonetheless, the complainant's inability to give a complete and consistent account of less important matters and certain details has not been held against him. However, what has been held against him is that he failed to report essential parts of his account immediately and that he made contradictory, vague and implausible statements regarding those matters.

6.16 The State party considers it significant that the complainant maintains that he was never involved with LTTE. The complainant stated that he was only forced to pay money to LTTE and hang decorations in his shop on the occasion of Great Heroes Day like other Tamils and shopkeepers. He stated that he never took part in the conflict in any way. Furthermore, the complainant stated that he was released after a short time after being arrested on each occasion, which suggests that he was not of any particular interest to the authorities.

6.17 Regarding the complainant's claim that he was asked to be an informant for the Sri Lankan authorities when he was first detained in 2008, the State party notes that there is no evidence that his refusal got him into trouble with the authorities, apart from the arrests in 2008, after which he was soon released. The fact that he was issued a national passport in September 2009 is also evidence that he was not the subject of adverse attention from the authorities at that time and that he did not leave the country illegally, as he claims.

6.18 The State party notes that, even though the complainant's sister was taken by the Sri Lanka Army in 1989, and raped and murdered for alleged involvement in LTTE, it does not mean that the complainant would necessarily experience problems in relation to those events if he were to return to Sri Lanka. The same applies with respect to his brother's alleged arrest in 2002. There is no evidence that his brother or sister were actually involved with LTTE or the armed conflict. The State party also notes that every Tamil who comes from the region that was held by LTTE has some direct or indirect link, such as through family members, with LTTE. That does not mean that every Tamil is at risk of treatment contrary to article 3 of the Convention against Torture.

Complainant's comments on the State party's observations on the merits

7.1 In his submission dated 13 April 2017, the complainant provided his comments to the State party's observations. The complainant challenges the State party's reference to judgments handed down by the European Court of Human Rights from 2011 to 2015, which indicate that (a) since the conflict in Sri Lanka ended, the level of adverse interest in failed asylum seekers returning to the country has decreased; and (b) there is a risk of treatment contrary to article 3 of the European Convention only if the alien can demonstrate that the authorities are interested in him or her specifically, for example, because he or she committed a criminal offence or was an influential member of LTTE. The complainant notes that those statements do not correspond to the relevant information about the situation in Sri Lanka for returning Tamils. In an updated submission to the Human Rights Committee for its consideration of the fifth periodic report of Sri Lanka in October 2014, Freedom from Torture stated that 96 per cent of victims of torture were of Tamil ethnicity.[12] The key factor that appeared to have led to the detention and torture of those men and women by the authorities was a real or perceived connection to LTTE — either their own connection and/or that of a family member or acquaintance. Those with personal involvement with LTTE had typically participated in a non-combat capacity, for example

[12] See Freedom from Torture updated submission to the Human Rights Committee for the fifth periodic review of Sri Lanka in October 2014, p. 6.

by providing services. Freedom from Torture concluded that Sri Lankan Tamils, who in the past had a real or perceived association at any level with LTTE, but were able to leave Sri Lanka safely, now faced a risk of torture on return. The complainant lists other reports that show that human rights violations and torture, in particular, have increased in the post-war period.[13] The complainant argues that all the reports indicate that, since the conflict in Sri Lanka has ended, the level of adverse interest in failed Tamil asylum seekers returning to the country has not decreased. In fact, they show that a mere suspicion of having any ties to LTTE — irrespective of how weak, old or personal — is enough to attract the adverse interest of the authorities upon return.

7.2 The complainant underlines that the Amnesty International, Medical Research Group report indicates that it is plausible that he was subjected to torture in Sri Lanka in the past. The report concludes that it is likely that most of the scars and physical problems described are related to the complainant's statements and that it is also likely that the psychological problems are also related to his statements. The complainant refers to the case of *M.C. v. the Netherlands*, in which the Committee ruled that the medical report from the Amnesty International, in which the scars were considered to be consistent with the complainant's statements, was a contributing factor in its decision, although IND decided that the complainant's statements were not credible, were vague and contrary to the general information about the country of origin.[14]

7.3 The complainant rejects the State party's claim that due care was exercised throughout the Dutch asylum procedures in respect of the complainant and due account was taken of article 3 of the Convention. He claims that due care was not exercised in his second asylum procedure, because IND decided to not reconsider their previous refusal to grant a temporary asylum residence permit to the complainant due to the absence of new information in the file. The Hague District Court upheld the decision of IND. However, the complainant did produce a supplementary medical report (from the Institute for Human Rights and Medical Research), which concluded that his psychological problems interfered with his capacity to produce full, coherent and consistent asylum statements during the interviews with IND. In the report of the Institute for Human Rights and Medical Research, it is stated that asylum seekers who have been subjected to torture or other extreme violence often have difficulties in speaking about that violence for various reasons, including memory and concentration. Fear, shame and distrust are also important factors. Asylum seekers often try to forget or to keep silent about the violence or they may have lost (a part of) their memory.

7.4 The complainant explains that he did not tell IND about the weapons hidden by his friend, because he was afraid that it would associate it with him and involvement in terrorist activities and that would have harmed his asylum application and result in his expulsion to Sri Lanka. He states that, although he did not say it during the interview on 11 October 2010, he later provided the information in the written corrections and additions to the report that he submitted on 13 December 2010, as was allowed by Dutch domestic law.

7.5 The complainant notes that his so-called easy escape from Karuna Group was due to the fact that he was held in an abandoned house rather than in a regular detention facility. Moreover, members of Karuna Group were mostly ethnic Tamils and they might have felt sorry for him and turned a blind eye to his escape.

7.6 Regarding his departure for India and subsequent return to Sri Lanka in 2010, the complainant explains that he was able to do that because his father paid 1.5 million Sri Lankan rupees to a human smuggler to arrange for his passport and visas and to bribe officials at the border. He cites several reports, which describe cases in which even high-

[13] See for example, The Bar Human Rights Committee of England and Wales (BHRC) and the International Truth and Justice Project — Sri Lanka, *An Unfinished War: Torture and Sexual Violence in Sri Lanka 2009–2014* (2014); and Sri Lanka Campaign for Peace and Justice, *Crimes against Humanity in Sri Lanka's Northern Province*, A legal analysis of post-war human rights violations (March 2014).

[14] CAT/C/56/D/569/2013.

profile LTTE members were able to leave Sri Lanka by paying bribes.[15] During his journey, he was always accompanied by a human smuggler and people always met him at airports to make sure he did not have any problems with the authorities. The fact that he was able to leave, return and leave again does not indicate that he was not wanted by the Sri Lankan authorities.

Additional comments by the complainant

8.1 On 14 and 18 April 2017, the complainant submitted additional comments. The complainant rejects the State party's assertion that he was never involved with LTTE. He states that during the ceasefire between LTTE and the Government of Sri Lanka (2002–2006), he decorated the area around his shop with LTTE paraphernalia, such as flags and posters, whenever there was an LTTE event. He also states that his activities were filmed by the Sri Lankan authorities. He further states that he paid money to LTTE. When the ceasefire ended, he was confronted with these activities in 2008 and accused of being an LTTE sympathizer. Those activities are regarded as LTTE involvement by the Sri Lankan authorities.

8.2 The complainant also rejects the State party's claim that, since he was issued a passport, there was no ban preventing him from leaving his place of residence. The complainant refers to the Netherlands, Ministry of Foreign Affairs country report on Sri Lanka dated 2 October 2014, which states that it is possible to buy falsified documents, stamps, stickers and forms in Sri Lanka. Besides, the culture of corruption and the use of altered registration and archiving procedures is widespread and increases the risk of inaccuracy and fraud at the registration and issuance of documents. Therefore, the fact that a passport was issued to him, does not indicate that there was no ban prohibiting him from leaving the area or his residence.

8.3 The complainant also challenges the State party's argument that the Sri Lankan authorities are aware that many Tamils — from the north and east of Sri Lanka — returning from Western countries, left Sri Lanka for economic reasons. The complainant believes that the authorities in Sri Lanka will assume that he applied for asylum abroad and that he would be regarded as a traitor because he would have told the Western authorities about the human rights violations in Sri Lanka. The Centre for Post-doctoral Education (CPO) in the Netherlands publishes the Government's report on international human rights procedures every year. The report contains cases pending before the Committee against Torture, including that of the complainant. The information is available on the Internet and, therefore, the Sri Lankan authorities can access it. The complainant thinks this will increase the risk of treatment contrary to article 3 of the Convention if he returns to Sri Lanka.

State party's additional observations

9.1 On 1 August 2017, the State party submitted additional observations on the merits of the communication. It reiterates that the complainant needs to substantiate that there is a foreseeable, real, personal and present risk of torture upon his return to Sri Lanka. The State party refutes the complainant's contention that it uses outdated jurisprudence and information when assessing asylum applications submitted by Sri Lankan Tamils. It notes that both IND and the domestic courts assessed the asylum seeker's account carefully in the light of up-to-date country of origin information. While noting that the situation of Tamils, in general, and former LTTE members, in particular, remains a cause for concern, the State party emphasizes several positive developments that have taken place in Sri Lanka. The Government of Sri Lanka has made incremental progress in addressing impunity for human rights violations. It has established a committee to examine allegations of torture and take preventive measures. The Government has pledged to repeal the Prevention of Terrorism

[15] See, for example, International Truth and Justice Project — Sri Lanka, *A Still Unfinished War: Sri Lanka's Survivors of Torture and Sexual Violence 2009–2015* (June 2015), pp. 25–26; Danish Immigration Service, *Human Rights and Security Issues concerning Tamils in Sri Lanka*, Report from Danish Immigration Service's fact-finding mission to Colombo, Sri Lanka, 19 June to 3 July 2010 (October 2010); and Schweizerische Flüchtlingshilfe (SFH), "Sri Lanka: Gefährdung rückkeh-render tamilischer Personen–Auskunft der SFH-Länderanalyse" (June 2015), p. 15 (in German only).

Act, under which former LTTE members were often detained, and replace it with legislation that complies with international standards. Although the human rights situation in Sri Lanka still gives cause for concern, in view of information from public sources, there is no reason to assume that every Tamil, whether or not they had links to LTTE in the past, will be subjected to treatment contrary to article 3 of the Convention upon returning to Sri Lanka. The State party is therefore of the view that the information in recent reports and that contained in reports cited by the complainant do not provide any reason to assess asylum applications by Tamils differently from what is set out in its observations of 28 October 2016.

9.2 The State party notes the complainant's explanation as to why he did not provide information about the weapons that his friend had allegedly hidden. It also notes that the complainant again changed his statement in that regard and it considers that, if anything, its credibility of that part of the complainant's account has been further reduced.

9.3 The State party remains unconvinced by the complainant's statement that his situation was different from that of his family members due to his earlier arrest and the fact that he had hung decorations associated with LTTE activities in his shop. The State party considers it unlikely that the Sri Lankan authorities would not have checked about involvement by all the complainant's family members in the investigation they carried out following the discovery of hidden weapons.

9.4 As to the complainant's claim that it did not say anything about Amnesty International's medical findings concerning his psychological problems, the State party reiterates that the complainant's inability to give a complete and consistent account of less important matters and certain details was not held against him. However, it held the fact that he failed to immediately report essential parts of his account against him and that he subsequently made contradictory, vague and implausible statements regarding those matters, even though they had had a major impact on him and were his main reason for leaving Sri Lanka.

9.5 Finally, the State party notes that, even if it were to accept the complainant's claim that he was subjected to ill-treatment during his third and fourth alleged arrests, it does not necessarily mean that, more than seven years later, there is a real risk that he will be subjected to such treatment upon returning to Sri Lanka. In view of the significant amount of time that has elapsed, the fact that the complainant was not involved in hiding the weapons and that no evidence has come to light that he actively supported LTTE in Sri Lanka or in the diaspora or that he is otherwise considered as a dangerous individual who could reignite the conflict in Sri Lanka, the State party does not consider it likely that the complainant will encounter problems like that with the Sri Lankan authorities if he returns to his country of origin.

Issues and proceedings before the Committee

Consideration of admissibility

10.1 Before considering any complaint submitted in a communication, the Committee must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22 (5) (a) of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

10.2 The Committee recalls that, in accordance with article 22 (5) (b) of the Convention, it shall not consider any complaint unless it has ascertained that the individual has exhausted all available domestic remedies. The Committee notes that, in the present case, the State party argues that the complainant has not exhausted all available domestic remedies because he failed to appeal the denial of his asylum application before the Administrative Jurisdiction Division of the Council of State. The Committee also notes the complainant's arguments that he mailed his appeal on the last day of the deadline and that the Council of State received it the next day. The Committee further notes that the Council of State gave the complainant the opportunity to substantiate the late submission of the

appeal, however, the complainant failed to convince the Council of State that there was a valid reason for missing the deadline for the appeal.

10.3 The Committee notes the complainant's argument that the appeal procedure of the Council of State is an ineffective remedy because it does not automatically suspend the expulsion proceedings and it rejects appeals that do not provide new facts. Therefore, an appeal to the Council of State would only be a formality rather than a procedure that would lead to a remedy.

10.4 The Committee considers that mere doubts about the effectiveness of a remedy do not absolve the complainant from seeking to exhaust such remedy. It is even more difficult to be persuaded by the argument of ineffectiveness, after one has failed to seek the remedy due to his or her own tardiness, which cannot be attributed to the State party. The Committee concludes that, in the circumstances, the complaint is inadmissible for non-exhaustion of domestic remedies, pursuant to article 22 (5) (b) of the Convention.

11. The Committee therefore decides:

(a) That the complaint is inadmissible under article 22 (5) (b) of the Convention;

(b) That the present decision shall be communicated to the complainant and to the State party.